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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 754

O. K. ARMSTRONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–10a) is reported at 228 F. 2d 764. The trial court's memorandum and order on petitioner's motion for acquittal or new trial (R. 42–59) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1956. The petition for certiorari was filed on March 12, 1956, the filing time having been extended to March 17, 1956, by order of Mr. Justice Clark dated January 31, 1956. (Pet. App. 10a.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in charging the jury that a $2,500 bonus check received by petitioner in 1949 was income.

2. Whether the trial court committed reversible error in charging the jury that petitioner had the burden of establishing certain deductions in arriving at his taxable income.

3. Whether a new trial should have been granted because three jurors stated in affidavits presented to the trial judge that they had not believed petitioner guilty but had compromised their verdicts.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years,

or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On March 11, 1954, petitioner was indicted in the United States District Court for the Western District of Missouri on charges of willfully attempting to evade large parts of his income taxes for the years 1947 through 1949 by filing fraudulent returns, in violation of Section 145 (b) of the Internal Revenue Code of 1939. The indict-

ment alleged that the amounts of net income and income tax declared by petitioner in his returns compared with the true amounts as follows (R. 1–2):

Year	Net income		Income tax	
	Reported	Corrected	Reported	Corrected
1947	$3,610.15	$9,537.49	$20.93	$1,302.69
1948	4,579.90	8,874.85	86.69	873.60
1949	3,939.60	9,561.72	6.57	1,030.76
Total	12,130.65	27,974.06	114.19	3,207.05

After a jury trial petitioner was found guilty on all three counts. (R. 35–36.) On June 3, 1955, the court imposed a fine of $500 and costs with respect to each of the counts. (R. 71.)

The evidence to support the verdict, the sufficiency of which is not challenged, is not reproduced in the record. It appears, however, from the trial court's memorandum and order on petitioner's motion for acquittal or, in the alternative, for a new trial (R. 42–59) that the Government adduced direct evidence of specific items of unreported income; that the correct net income as thus proved was substantially the amount alleged in the indictment with respect to each year; and that there was ample evidence of willfulness.

The evidence appearing in the printed record consists almost entirely of testimony and documents relating to a $2,500 bonus check received by petitioner from the Readers' Digest Association, Inc. in November, 1949. Apparently, peti-

tioner was a contributing writer and staff member of Readers' Digest, for he received many payments from them in 1949, including the $2,500 bonus check (R. 5–7), and the editor of Readers' Digest testified that such bonuses are given only to staff members who are contributing writers, and never to others (R. 8). The item was shown on the records of Readers' Digest as "Bonus" and treated by them as compensation to petitioner. (R. 8–9.) Petitioner testified that he had not reported the $2,500 check as income on his original return because he considered it a gift, since Readers' Digest owed him nothing at the time and later paid him for all subsequent work, but that he had reported it as income in an amended return filed during the course of the Treasury agents' investigation. (R. 16–18.)

Petitioner requested an instruction to the jury under which they would have been permitted to determine whether the check was a gift or represented compensation for services rendered. (R. 18–19.) The court charged the jury that the item was income taxable to petitioner but that the decisive question with respect to it was whether its omission from the tax return was willful. (R. 29–30.) Petitioner made no objection to the charge as given other than a general objection to the court's failure to give the instructions requested by him. (R. 34.)

ARGUMENT

1. Petitioner argues (Pet. 9–11) that the trial court erred in charging the jury that the $2,500 bonus check from Readers' Digest was income as a matter of law (R. 29). We think the Court of Appeals was correct in holding (Pet. App. 2a–7a) that petitioner had not properly preserved the point for review by timely and specific objection at the trial and by furnishing Government counsel with a copy of the requested instruction (R. 18–19) as required by Rule 30, Federal Rules of Criminal Procedure. *Wong Tai* v. *United States*, 273 U. S. 77, 83; *Boyd* v. *United States*, 271 U. S. 104, 107–108; cf. *Johnson* v. *United States*, 318 U. S. 189, 200–201. It should also be noted that the item complained of represented less than half the unreported income with respect to Count III (the sufficiency of proof of the other items being unchallenged), and had no bearing on the first two counts. Moreover, the important question was not whether a particular item constituted income, but the presence or absence of willfulness in petitioner's mind at the time he prepared his returns. On the issue of whether petitioner *believed* the item to be a gift and hence non-taxable, the trial court gave an unexceptionable instruction (R. 29–30).

Petitioner contends that the holding below conflicts with *Bogardus* v. *Commissioner*, 302 U. S. 34. He quotes from the dissenting opinion (302 U. S. at 45) which states that there was a ques-

tion of fact as to whether the payments there involved were income or gifts.[1] The majority opinion, however, held (302 U. S. at 38–39) that this was "a conclusion of law or at least a determination of a mixed question of law and fact". In the instant case the undisputed evidence showed that petitioner was engaged, before and after the payments, as a writer for the corporation; that bonuses were given to no one except such writers; that it was the intention of the corporation that the amount should represent additional compensation; that the corporation treated it as such on its own books and deducted it on its own tax return; and that petitioner reported the item as income in an amended return filed during the course of the Treasury agents' investigation (supra, pp. 4–5). Whether a payment of this nature is compensation or a gift is largely a matter of intention (*Helvering* v. *National Grocery Co.*, 304 U. S. 282, 289; *Fisher* v. *Commissioner*, 59 F. 2d 192, 193 (C. A. 2d)), and where it is made by an employer to an employee there is a strong presumption that it is compensation for services rendered and hence includible in income. *Poorman* v. *Commissioner*, 131 F. 2d 946, 949–950

[1] In the *Bogardus* case, the payments were gratuities given to long-time employees of a predecessor corporation, and there was a plain lack of intent that the payments should constitute income to the donees. The corporation did not treat them as deductions for tax purposes nor did it charge them to expense on its books. The donees had, at the time of the payments, no connection with the donor corporation.

(C. A. 9th); cf. *Commissioner* v. *Jacobson,* 336 U. S. 28. The fact that the payment was entirely voluntary is not controlling. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 730. In the circumstances of the instant case, we believe that it was proper to hold, as a matter of law, that the item was income. In any event, petitioner was not prejudiced by the instruction complained of.

2. Petitioner contends (Pet. 11–13) that the trial court erred in instructing the jury that petitioner had the burden of proving that he was entitled to deductions in addition to those allowed by the Government in computing his alleged correct net income. (R. 31.) No objection was made to this charge at the trial, or on the motion for new trial, nor was the point raised in the Court of Appeals. It is difficult to appraise the contention in the light of the issues presented at the trial, for the record is extremely scanty and the testimony reproduced there relates almost entirely to the $2,500 item (Point 1 of the petition). It appears, however, from the trial court's memorandum and order on petitioner's motion for acquittal or new trial that the deductions allowed petitioner in the Government's computations of his income for each of the three years were substantially greater than those claimed on his returns. (R. 43–45.) Under these circumstances, the burden was clearly on petitioner to go forward with the evidence and establish that he had

additional unclaimed deductions, for the admissions implicit in his returns alone (even without regard to the unclaimed amounts allowed by the Government) were sufficient to sustain the Government's burden. *United States* v. *Hornstein,* 176 F. 2d 217, 220 (C. A. 7th); *United States* v. *Stayback,* 212 F. 2d 313 (C. A. 3d), certiorari denied, 348 U. S. 911; *United States* v. *Bender,* 218 F. 2d 869, 871–872 (C. A. 7th), certiorari denied, 349 U. S. 920; *Clark* v. *United States,* 211 F. 2d 100, 103 (C. A. 8th), certiorari denied, 348 U. S. 911; *United States* v. *Link,* 202 F. 2d 592, 593–594 (C. A. 3d). Cf. *Warszower* v. *United States,* 312 U. S. 342, 347.

3. Petitioner urges, finally (Pet. 13–23), that a new trial should have been granted on the basis of affidavits of three jurors, filed many days after the verdict, stating that they had not really believed petitioner guilty but that, for the sake of unanimity, they had agreed to a "compromise verdict" under which petitioner was found guilty with a recommendation for leniency (R. 37–38, 40–42). On this point, he asserts a conflict with *Mattox* v. *United States,* 146 U. S. 140; *Clark* v. *United States,* 289 U. S. 1; and *Jorgensen* v. *York Ice Machinery Corp.,* 160 F. 2d 432 (C. A. 2d).

But none of these cases aids petitioner in the slightest. The opinion in *Clark* expressly states (289 U. S. at 18) that the case has nothing to do with the rule that a juror's testimony is inadmissible to impeach his verdict. The case in-

volved a contempt conviction against a juror for giving false answers to questions affecting her qualifications as a juror and for gross misconduct while serving as a juror.

The *Jorgensen* case held (160 F. 2d at 435) that a compromise verdict in a civil case is *not* a ground for a new trial.[2]

As for *Mattox* v. *United States, supra,* it is strong authority against petitioner's contention. There, a murder conviction was reversed because the lower courts had refused to consider affidavits of jurors stating that there was read to them during their deliberations a newspaper article highly prejudicial to the defendant. This Court said (146 U. S. at 148–149):

> There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.
>
> This distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in *Perry* v. *Bailey,* 12 Kans. 539, 545: "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to

[2] The distinction petitioner urges (Pet. 17–18) is that in that case the District Court and the Court of Appeals considered the jurors' affidavits, while here the District Court ordered them stricken from the record. But it is clear that the result reached in the *Jorgensen* case is exactly the same as the result here. In both cases, the Courts of Appeals considered affidavits of jurors stating that they had wrongfully agreed to a compromise verdict, and in both cases it was held that such affidavits furnished no ground for a new trial.

> overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one."

The rule discussed in *Mattox* has been reaffirmed by this Court. *McDonald* v. *Pless,* 238 U. S. 264, 267–268; *Hendrix* v. *United States,* 219 U. S. 79, 91; *Stein* v. *New York,* 346 U. S. 156, 178. Petitioner's argument (Pet. 22–23) that in the instant case the jurors were not impeaching their verdicts but merely explaining their own misconduct in surrendering their honest convictions for the sake of unanimity, and that the "compromise" does not inhere in the verdict, is entirely without merit. *Hyde* v. *United States,* 225 U. S. 347, 381–384.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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